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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

18 This Document Relates to:

19 *Costco Wholesale Corporation v. Hitachi,*
20 *Ltd., et al., Individual Case No. 11-cv-06397*

21 *Sears, Roebuck and Co. and Kmart Corp v.*
22 *Chunghwa Picture Tubes, Ltd., et al.,*
Individual Case No. 11-cv-05514

23 *Office Depot Inc. v. Hitachi Ltd., et al.,*
24 Individual Case No. 11-cv-06276

25 *Interbond Corporation of America d/b/a*
26 *BrandsMart USA v. Hitachi, Ltd., et al.,*
Individual Case No. 11-cv-06275

27 *P.C. Richard & Son Long Island Corporation*
28 *et al. v. Hitachi Ltd., et al., Individual Case*
No. 12-cv-02648

Case No. Master File No. 3:07-cv-05944-SC

MDL NO. 1917

**DEFENDANTS' JOINT NOTICE OF
MOTION AND MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST
CERTAIN DIRECT ACTION
PLAINTIFFS ON STATE LAW CLAIMS
LIMITED TO INTRASTATE ACTIVITY
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
– Redacted**

[[Proposed] Order filed concurrently herewith]

Judge: Hon. Samuel Conti

Date: February 6, 2015

Time: 10:00 a.m.

Ctrm: 1, 17th Floor

3:07-cv-05944-SC; MDL 1917

1 *Costco Wholesale Corp. v. Technicolor SA, et*
2 *al.*, No. 13-cv-05723

3 *Sears, Roebuck & Co., et al. v. Technicolor*
4 *SA, et al.*, No. 13-cv-05262

5 *Office Depot, Inc. v. Technicolor, et al.*, No.
6 13-cv-05726

7 *Interbond Corporation of America v.*
8 *Technicolor SA, et al.*, No. 13-cv-05727

9 *P.C. Richard & Son Long Island Corp., et al.*
10 *v. Technicolor SA*, No. 13-cv-05725

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NOTICE OF MOTION AND JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 6, 2015 at 10:00 a.m., or as soon as counsel may be heard thereafter, in Courtroom 1, 17th Floor, San Francisco, California before the Honorable Samuel Conti, the undersigned defendants will move the Court, pursuant to Federal Rule of Civil Procedure 56, for partial summary judgment with respect to certain state law claims of Plaintiffs Costco Wholesale Corporation (“Costco”); Kmart Corp. (“Kmart”); and Office Depot, Inc. (“Office Depot”); Interbond Corporation of America d/b/a BransMart USA (“Interbond”); and MARTA Cooperative of America, Inc. (“MARTA”) (collectively, “Plaintiffs”). Specifically, this motion seeks partial summary judgment on the following claims for relief with the exception of Plaintiffs’ Michigan state law claims against HEDUS and the Philips Defendants:

1. Costco’s Fourth and Fifth Claims for Relief under Arizona and Florida state law;
2. Kmart’s Third Claim for Relief under Michigan state law;
3. Office Depot’s Second Claim for Relief under Florida state law;
4. Interbond’s Second Claim for Relief under Florida state law; and
5. MARTA’s Second Claim for Relief under Arizona and Michigan state law.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the Declaration of Laura K. Lin in Support of Defendant’s Motion for Partial Summary Judgment Against Certain Direct Action Plaintiffs on Due Process Grounds (“Lin Decl.”), and any materials attached thereto or otherwise found in the record, along with the argument of counsel and such other matters as the Court may consider.

1 Dated: November 7, 2014

Respectfully submitted,

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16 *Electronics USA, Inc.; and LG Electronics Taiwan Taipei*

17 *Co., Ltd.*

MEMORANDUM OF POINTS AND AUTHORITIES

QUESTION PRESENTED¹

Whether certain of Plaintiffs' state law claims based on indirect purchases are barred where the laws of the respective states only apply to anticompetitive conduct that occurred *within* that state and Plaintiffs fail to offer any evidence of such conduct?

SUMMARY OF ARGUMENT

Certain Plaintiffs² assert claims pursuant to the laws of states that limit the reach of their antitrust and anticompetitive statutes to conduct occurring within the state. Specifically, Plaintiffs bring state law claims under the laws of the following states that require intrastate conduct: Florida, Arizona, and Michigan. Where Plaintiffs fail to identify anticompetitive conduct within these states, their claims must fail and summary judgment with respect to these claims should be granted in favor of Defendants.

OVERVIEW OF CLAIMS ADDRESSED

Plaintiffs are companies that purchased products containing Cathode Ray Tubes ("CRTs") and resold them directly to consumers or through distribution channels. Plaintiffs allege that Defendants engaged in a conspiracy to fix the prices of CRTs. Along with federal law claims, Plaintiffs allege the following state law claims at issue in this motion:

1. Costco's Fourth and Fifth Claims for Relief under Arizona and Florida state law;³
2. Kmart's Third Claim for Relief under Michigan state law;
3. Office Depot's Second Claim for Relief under Florida state law;
4. Interbond's Second Claim for Relief under Florida state law; and

¹ Lin Declaration Exhibit C describes how Defendants' motions concerning Plaintiffs' state law claims relate to one another. As Exhibit C details, the Court need not consider certain of Defendants' motions if it finds in Defendants' favor on other motions.

² The Plaintiffs at issue in this motion are: Costco, Kmart, Office Depot, Interbond, and MARTA.

³ Panasonic Corporation, Panasonic Corporation of North America and MT Picture Display Co., Ltd. ("MTPD") do not move with respect to Costco's claims, as they are not named in Costco's complaint. The SDI Defendants and Philips Defendants likewise do not move with respect to Costco's claims because Costco does not assert any state law claims against them.

1 5. MARTA's Second Claim for Relief under Arizona and Michigan state law.

2 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

3 In discovery, Plaintiffs identified the alleged anticompetitive conduct at issue by creating
 4 an "Exhibit A," as well as by pointing to Defendants' own discovery responses and generally
 5 referencing all documents produced by any party.⁴ Exhibit A lists alleged anticompetitive
 6 communications by date, location, and individual participants. Plaintiffs purported to identify
 7 which Defendants were affiliated with each entry on Exhibit A, but failed to specify the particular
 8 Defendants by corporate entity. (Thus, for instance, "SDI" is one column on Exhibit A, without
 9 reference to which of the seven SDI Defendants is at issue.) [REDACTED]

10 [REDACTED].⁵

11 Exhibit A (consistent with all of the discovery in these matters) indicates that substantially
 12 all of the alleged misconduct at issue occurred abroad. [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]

18 _____
 19 ⁴ See, e.g., Lin Decl. Ex. 20 (Office Depot's Objections and Responses to Hitachi Asia, Ltd.'s
 20 First Set of Interrogatories, Response to Interrogatory No. 1 (stating that "[e]vidence supporting
 21 defendants' and their co-conspirators' illegal price fixing agreement includes" various expert
 22 reports and discovery responses by others, and an Exhibit A)). The most recent supplement of this
 23 "Exhibit A" is attached as Exhibit A to the accompanying declaration of Laura K. Lin ("Exhibit
 24 A").

25 ⁵ Exhibit A.

26 ⁶ As described in the Lin Declaration, Defendants created Exhibit B by filtering Plaintiffs' Exhibit
 27 A by location (as identified by Plaintiffs in the second column of their Exhibit A) and selecting
 28 entries that reference, or appear to reference, the United States. See Lin Decl. ¶ 4. In addition,
 Defendants added entries to Exhibit B based on the allegations relating to conduct in the United
 States as cited in the exhibits to the Rebuttal Expert Report of Jerry A. Hausman (Sept. 26, 2014).
Id. These latter entries are designated with the letter "H" in Exhibit B. Although Plaintiffs have
 indicated that their evidence of anticompetitive conduct may arise from all discovery documents
 and responses, Defendants have not located any additional references to Plaintiffs' allegations of
 anticompetitive conduct in the United States.

A. Plaintiffs Have Identified No Evidence of Anticompetitive Conduct Within Florida

Plaintiffs have not identified evidence of any purportedly anticompetitive conduct by Defendants within Florida.⁷

B. Plaintiffs Purport to Have Identified One Instance of Anticompetitive Conduct in Arizona Allegedly Involving Two Defendants

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Plaintiffs Purport to Have Identified Three Instances of Anticompetitive Conduct in Michigan

[REDACTED]

Plaintiffs' purported evidence does not involve any alleged anticompetitive activity by the LG Defendants, the Mitsubishi Defendants, the Toshiba Defendants, or Panasonic Corporation.¹² As to the SDI Defendants, Plaintiffs have [REDACTED]

[REDACTED]

⁷ See Exhibit A; Exhibit B.

⁸ See Exhibit A; Exhibit B.

⁹ Lin Decl. Ex. 24 (HEDUS-CRT00160563 (cited in Exhibit A line 284)).

¹⁰ Lin Decl. Ex. 21 (Deposition of L. Thomas Heiser (March 18 – 19, 2014) at 191:17-193:9).

¹¹ See Exhibit A (lines 857, 1075, 1346); Exhibit B (lines 857, 1075, 1346).

¹² See Exhibit A (lines 857, 1075, 1346); Exhibit B (lines 857, 1075, 1346).

[REDACTED]

[REDACTED] See Lin Decl. Ex. 28 (MTPD-0576843).

1 [REDACTED]¹³ Further, as to defendant MTPD, [REDACTED]

2 [REDACTED]

3 [REDACTED]¹⁴.

4 LEGAL STANDARD

5 Summary judgment is appropriate when there is no genuine issue of material fact and the
6 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party moving
7 for summary judgment has the initial burden of identifying the absence of a genuine issue of
8 material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *In re Oracle Corp.*
9 *Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

10 Where, as here, the moving party meets its burden, the non-moving party must identify
11 facts showing that a genuine issue for trial exists. *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 387
12 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The non-moving party may not rely
13 on the pleadings but must come forward with evidence – affidavits, depositions, answers to
14 interrogatories, or admissions – from which a jury could reasonably render a verdict in its favor.
15 *Id.* (citing *Anderson*, 477 U.S. at 252). “The nonmoving party must show more than the mere
16 existence of a scintilla of evidence” or “some ‘metaphysical doubt’ as to the material facts at
17 issue.” *Id.* (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586
18 (1986)).

19 ARGUMENT

20 I. The Applicable Laws in Florida, Arizona, and Michigan Require Intrastate 21 Anticompetitive Conduct

22 Each of the Relevant States’ laws apply only to anticompetitive conduct that occurred
23 *within* the state.

24 _____

25 ¹³ See Exhibit A (line 1346 (citing Robert O’Brien (Philips) Dep. at 251:20-258:2 and PTC-
26 0004295); Exhibit B (line 1346) (citing same). See also Lin Decl. Ex. 11 (Robert O’Brien
(Philips) Dep. at 251:20-258:2); *id.* Ex. 8 (PTC-00004295).

27 ¹⁴ Exhibit A (line 1075 (citing Iwamoto Dep. at 45-55, 81, 262-64, 359-64); Exhibit B (line 1075)
28 (citing same); see also Lin Decl. Exs. 29, 30 (Shinichi Iwamoto (Feb. 7-8, 2013) Dep. at 45:1-
55:25, 81:1-25, 262:1-264:25, 359:1-364:25); Lin Decl. Ex. 28 (MTPD-0576843).

1 In Florida, indirect purchaser damages are available pursuant to the Florida Deceptive and
 2 Unfair Trade Practices Act (“FDUPTA”). *See Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100
 3 (Fla. Dist. Ct. App. 1996). Florida courts have consistently held that FDUPTA “seeks to prohibit
 4 unfair, deceptive and/or unconscionable practices which have transpired within the territorial
 5 boundaries of [Florida].” *Millennium Commc’ns & Fulfillment, Inc. v. Office of Att’y Gen.*, 761
 6 So.2d 1256, 1262 (Fla. Dist. Ct. App. 2000) (emphasis added); 10A Florida Jurisprudence (2d Ed.
 7 2014) § 165 (“Florida Deceptive and Unfair Trade Practices Act (FDUTPA) applies only to
 8 actions that occurred within the state of Florida.”). As a result, courts interpreting Florida law
 9 have dismissed plaintiffs’ FDUPTA claims where a plaintiff fail to “specify the location of the
 10 conduct to make certain it occurred within the territorial boundaries of Florida.” *Five for Entm’t*
 11 *S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1331 (S.D.Fla. 2012); *see also id.* at 1330 (“FDUTPA
 12 applies only to actions that occurred within the state of Florida.”); *Beaver v. Inkmart, LLC*, , 2012
 13 WL 4005970, at *3 (S.D. Fla. Sep. 12, 2012) (dismissing FDUTPA claims “[b]ecause none of the
 14 alleged misconduct occurred within Florida”) (internal quotation marks and citation omitted);
 15 *Carnival Corp. v. Rolls-Royce PLC*, , 2009 WL 3861450, at *6 (S.D. Fla. Nov. 17, 2009) (noting
 16 that “FDUTPA applies only to action that occurred within the state of Florida” and dismissing
 17 claims based on actions that occurred outside of Florida).

18 Arizona and Michigan’s antitrust statutes similarly apply only to intrastate anticompetitive
 19 conduct. *See Ariz. Rev. Stat. Ann. § 44-1402* (“A contract, combination or conspiracy between
 20 two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is
 21 *within this state*, is unlawful.” (emphasis added)); Mich. Comp. Laws Ann. § 445.772 (“A
 22 contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize,
 23 trade or commerce *in a relevant market* is unlawful.” (emphasis added)); Mich. Comp. Laws Ann.
 24 § 445.771(b) (“‘Relevant market’ means the geographical area of actual or potential competition
 25 in a line of trade or commerce, all or any part of which is within this state.”). *See also Aurora*
 26 *Cable Commc’ns, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600, 603 (W.D. Mich. 1989) (the
 27 Michigan antitrust law “parallels the Sherman Antitrust Act as it applies to intrastate conduct”); *In*
 28

1 *re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 407 n.8 (S.D.N.Y. 2011) (finding that
2 Michigan antitrust law requires intrastate conduct).

3 Courts interpreting similar state laws have likewise concluded that plaintiffs must identify
4 anticompetitive conduct *within* the state whose law they seek to apply. *See, e.g., In re Lithium Ion*
5 *Batteries Antitrust Litig.*, 2014 WL 4955377, at * (N.D. Cal. Oct. 2, 2014) (dismissing New
6 Hampshire Consumer Protection Act claim with prejudice where plaintiffs failed to identify
7 anticompetitive conduct within New Hampshire) (citing N.H. Rev. Stat. Ann. § 358-A:2
8 (prohibiting “any unfair method of competition or any unfair or deceptive act or practice in the
9 conduct of any trade or commerce within this state”)).

10 **II. Defendants Are Entitled to Partial Summary Judgment Where Plaintiffs Fail**
11 **to Identify Intrastate Anticompetitive Conduct Within the Respective States**

12 The undisputed material facts show that Plaintiffs fail to satisfy the requirements of
13 Florida, Arizona and Michigan law with respect to some or all Defendants. Plaintiffs have alleged
14 no anticompetitive conduct by any Defendant within Florida and, as a result, Defendants are
15 entitled to partial summary judgment on Plaintiffs’ Florida claims. *See Millennium Commc’ns &*
16 *Fulfillment, Inc.*, 761 So.2d at 1262 (requiring intrastate anticompetitive conduct). Similarly,
17 Defendants are entitled to partial summary judgment on Plaintiffs’ Arizona claims because
18 Plaintiffs fail to identify any alleged anticompetitive conduct by Defendants in Arizona. *See Ariz.*
19 *Rev. Stat. § 44-1402* (requiring intrastate anticompetitive conduct).

20 *Finally*, other than HEDUS and the Philips Defendants (which do not move with respect to
21 the Michigan claims against them), Defendants are entitled to partial summary judgment on
22 Plaintiffs’ Michigan claims. Plaintiffs have not identified any anticompetitive conduct by the LG
23 Defendants, SDI Defendants, or Toshiba Defendants in Michigan. [REDACTED]

24 [REDACTED]
25 [REDACTED]
26 [REDACTED] *See, e.g., In re Citric Acid*
27 *Litig.*, 996 F. Supp. 951, 958 (N.D. Cal. 1998) (holding that where there was no evidence that

28 ¹⁵ Exhibit A (line 1075); Exhibit B (line 1075).

1 conspiratorial action was ever discussed at individual meetings, such meetings could only be
 2 considered circumstantial evidence of conspiracy), *aff'd*, 191 F.3d 1090 (9th Cir. 1999); *In re*
 3 *Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (noting that competitors may
 4 exchange price information for legitimate business reasons); *Supermarket of Homes, Inc. v. San*
 5 *Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1407 (9th Cir. 1986) (same); *Market Force Inc.*
 6 *v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir.1990) (“[I]t is well established that
 7 evidence of informal communications among several parties does not unambiguously support an
 8 inference of a conspiracy.”).

9 Accordingly, other than HEDUS and the Philips Defendants, Defendants are entitled to
 10 partial summary judgment on Plaintiffs’ Michigan claims because Plaintiffs fail to identify any
 11 alleged anticompetitive conduct by these Defendants in Michigan. *See Mich. Comp. Laws Ann.*
 12 *§ 445.772* (requiring intrastate anticompetitive conduct).

13 CONCLUSION

14 For the foregoing reasons, Defendants respectively request that this Court award partial
 15 summary judgment in favor of Defendants with respect to the following claims:

- 16 1. Costco’s Fourth and Fifth Claims for Relief under Arizona and Florida state law;
- 17 2. Kmart’s Third Claim for Relief under Michigan state law but not with respect to Kmart’s
 18 Kmart’s Michigan law claims against HEDUS and the Philips Defendants;
- 19 3. Office Depot’s Second Claim for Relief under Florida state law;
- 20 4. Interbond’s Second Claim for Relief under Florida state law; and
- 21 5. MARTA’s Second Claim for Relief under Arizona and Michigan state law, but not with
 22 respect to MARTA’s Michigan law claims against HEDUS and the Philips Defendants.
 23

24
 25 Dated: November 7, 2014

Respectfully submitted,

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